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**BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH**

UTAH CHAPTER OF THE SIERRA CLUB,
et al.,

Petitioners,

Docket No. 2009-019
Cause No. C/025/0005

DIVISION OF OIL, GAS AND MINING,
Respondent, and

ALTON COAL DEVELOPMENT, LLC, and
KANE COUNTY, UTAH,
Intervenors-Respondents.

**PETITIONERS' POST-HEARING BRIEF ADDRESSING AIR QUALITY AND
CULTURAL/HISTORIC ISSUES**

The Division of Oil, Gas and Mining's ("Division's") regulations prohibit the approval of a permit application unless the Division "finds, in writing, on the basis of information set forth in the application or from information otherwise available that is documented in the approval" that certain requirements are met. UT ADC R645-300-133.

These requirements include the protection of air quality and cultural and historic resources. Here, the Division admitted that it could not evaluate the effectiveness of the fugitive dust monitoring plan yet approved the permit anyway. In addition, the record fails to document the identification of an adjacent area evaluated in addition to the permit area for effects of the proposed Coal Hollow mine on cultural/historic resources. The record also demonstrates that Division had not completed an evaluation of the entire permit area when evaluating the mine's impacts on cultural/ historic resources prior to approving the Coal Hollow permit on October 19, 2009.

I. The Division's Approval of the Coal Hollow Mine Violated the Applicable Air Quality Regulations.

The Division's regulations require that each coal mine permit application include a fugitive dust control plan. UT ADC R645-301-423.200 and UT ADC R645-301-424. The regulations impose two specific requirements on mines with projected production rates exceeding 1,000,000 tons of coal per year. UT ADC R645-301-423. First, the fugitive dust control plan must meet the specifications of UT ADC R645-301-244.100 and UT ADC R645-301-244.300. Second, the permit application must include "an air quality monitoring program to provide sufficient data to evaluate the effectiveness of the fugitive dust control practices . . . to comply with federal and Utah air quality standards." UT ADC R645-301-423.100. Alton Coal Development, LLC, ("ACD") has sought authorization for a mine that will produce approximately 2,000,000 tons of coal annually. Division of Oil, Gas and Mining, Decision Document and Application Approval (October 19, 2009) [D-3] at 3.¹

¹ Exhibits offered and entered as evidence in the hearing held before the Board on April 29-30, 2010, are indicated by the numbers by which they were marked at the hearing.

A. The Division Failed to Determine that the Fugitive Dust Control Plan for the Coal Hollow Mine Met the Requirements of the Division's Regulations Prior to Approving the Mine Permit.

No dispute exists regarding whether the Division found the fugitive dust control plan submitted by ACD adequate. The Division admits that it did not. The Division's "finding" related to the fugitive dust control plan indicates that "[t]he information provided in the application *may* meet the requirements of the Air Quality rules for R645-301-423.200. However, the Division does not provide training for permitting staff or inspectors in the application of EPA Method 9." Division of Oil, Gas and Mining, Technical Analysis (Oct. 15, 2009) [hereafter "*Final TA*"] at 87 [D.8]. The Division explicitly acknowledged that it "does not have the expertise to evaluate the use of method 9." Email from Priscilla Burton to Jon Black re. Fugitive Dust Plan (Oct. 13, 2009) [D.7]. Lacking the necessary expertise, the Division failed to complete the evaluation required by UT ADC R645-301-423.100 that the monitoring program would provide "sufficient data."

Rather than completing the evaluation of the effectiveness of the fugitive dust control plan itself, the Division deferred to an evaluation by the Utah Division of Air Quality ("DAQ") *that has not yet occurred*. Excerpts of Rule 30(b)(6) Deposition of Priscilla Burton (Feb. 22, 2010) at 78, attached as Exh. 14. ("Q. Do you have experience in evaluating monitoring protocol for fugitive dust? A. No, I don't. And that's my point in the finding. Q. So will it be, then, the division of air quality that evaluates the effectiveness of the fugitive dust control plan, including the monitoring protocol? A. Yes, I hope that that is the case."). *See also* Informal Hearing Transcript *In the Matter of Request for Agency Action and Board Review of the Division's October 19, 2009,*

Approval of the Application of Alton Coal Development, LLC, to Conduct Surface Coal Mining and Reclamation Operations in Coal Hollow, Kane County, Utah, (Volume I A.M. and P.M. Sessions, April 29, 2010) [hereafter “Informal Hearing Transcript”],

Testimony of Priscilla Burton at 105 ln 17 to 106 ln 3:

17 MS. BURTON: "Attached is the Fugitive Dust
18 Control Plan that was included in the Coal Hollow Mine
19 application. . . .

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1 I am hopeful that DOGM will
2 coordinate the permitting and compliance of this control
3 plan with DAQ *in the future*.

(emphasis added). Division staff Ms. Burton testified that the air quality review by DAQ had not yet occurred to the best of her knowledge.

13 MR. DONALDSON: And to your knowledge, has ACD,
14 or Alton Coal Development, obtained an air quality
15 approval order from the Division of Air Quality at this
16 time?

17 MS. BURTON: Not to my knowledge.

Informal Hearing Transcript (April 29, 2010), Testimony of Priscilla Burton at 108 lns. 12-17.

B. The Division Was Required to Wait for the Division of Air Quality’s Approval Before Approving the Coal Hollow Mine Application.

The unambiguous language of the Division’s own regulations prohibits approval of a permit application that lacks a complete and sufficient fugitive dust control plan. UT ADC R645-300-133. (“No permit application . . . will be approved unless the application affirmatively demonstrates and the Division finds, in writing . . . [that] the applicant has complied with all the requirements of the State Program.”). As explained above, one of the explicit requirements of the State Program is the inclusion of a monitoring program

“to provide sufficient data to evaluate the effectiveness of the fugitive dust control practices.” UT ADC R645-301-423.100. Lacking the necessary expertise, the Division did not find that this requirement had been met. As a result, the Division’s approval of the permit was unlawful.

If the Division chooses to rely on the Division of Air Quality (“DAQ’s”) expertise in evaluating the fugitive dust control plan, the Division must wait until DAQ’s evaluation is complete before approving the Coal Hollow Mine permit. A mine may need various different types of permits including an air permit, a water discharge permit, a wetlands permit and others. The purpose of the Division’s permit is to unite the various factors and analysis done by different agencies into a comprehensive picture of the consequences that will flow from the mine’s construction. The Division is responsible for this comprehensive picture having been delegated authority to issue mine permits pursuant to the Surface Mining Control and Reclamation Act (“SMCRA”). *See e.g.*, 30 U.S.C. § 1201(k) (“the cooperative effort established by this chapter is necessary to prevent or mitigate adverse environmental effects of present and future surface coal mining operations”); H.Rep.No. 95-218 pt. 91, 95th Congress, 1st Session (1977) at pt. 91 (“Valid environmental factors tend to receive short shrift. To meet this problem the bill delineates in detail the type of information required in permit applications . . . and the criteria for assessing the merits of the application”) available at <http://www.osmre.gov/congress/leghistory/congressrpts/042277.pdf>.

The views of the Administration at the time SMCRA passed reinforce the comprehensive nature of the coal mine permit program:

DEAR MR. CHAIRMAN: This letter supplements the administration's views set forth in our letter of February 4, 1977, on H.R. 2, the "Surface Mining

Control and Reclamation Act of 1977." We strongly support your efforts to provide sound strip mine legislation. H.R. 2 provides a framework for administering a comprehensive, workable, surface mining and reclamation program.

Letter from Cecil Andrus, Secretary, Department of the Interior, to Hon. Morris K. Udall, Chairman, House Committee on Interior and Insular Affairs (April 5, 1977), reprinted in H.Rep.No. 95-218 pt. 91, 95th Congress, 1st Session (1977).

Public participation in this comprehensive look at the impacts of a proposed surface coal mine is a cornerstone of SMCRA's permit program as delegated here to the Division. H.Rep.No. 95-218 pt. 91, 95th Congress, 1st Session (1977) at pt. 88 ("The success or failure of a national coal surface mining regulation program will depend, to a significant extent, on the role played by citizens in the regulatory process."). DAQ has not provided any public participation to date regarding the air quality permit for which ACD has applied. Even if DAQ provides some public participation at a later date, such later public participation cannot substitute for including the air quality issues in the Division's review at the same time other environmental factors were considered before approving the Coal Hollow Mine permit application on October 19, 2009.

The expertise of the Division of Air Quality is relevant to approval of the Coal Hollow Mine, but both the Division's regulations and SMCRA require that this expertise inform review of the mine's permit application *before* it is approved by the Division. Conditioning the permit on approval of the air quality permit provides for some evaluation of the fugitive dust control plan before surface disturbance occurs, but it does not provide the comprehensive picture the Division's regulations and SMCRA require.

C. The Division Should Not Have Approved the Coal Hollow Mine Without Measures Sufficient to Protect the Clarity of Night Skies.

The arguments by the Division and ACD to exclude the issue of the clarity of the night sky ignore the relevance of fugitive dust to visibility both during the day and at night. As indicated in its Order on the Motions to Dismiss, the Board also appears to have overlooked the relevance of fugitive dust to the clarity of night skies. Board of Oil, Gas and Mining, *Order Concerning Motions to Dismiss* (February 18, 2010) at 4. Petitioners ask the Board to reconsider its earlier legal conclusion in its *Order Concerning Motions to Dismiss* that the “controlling regulations create no requirement to consider the impact of fugitive dust on night sky clarity.”

The Division’s regulations contain an unambiguous requirement to include a fugitive dust control plan in the permit application. UT ADC R645-301-423.200. The control plan must ensure that “all exposed surface areas will be protected and stabilized to effectively control erosion and air pollution attendant to erosion.” UT ADC R645-301-244.100. The unambiguous language of the Division’s regulations requires that the control plan “effectively control . . . air pollution attendant to erosion.” *Id.* Impacts to visibility both during the day and night are one type of air pollution attendant to erosion. In the words of the Forest Service, “Night sky quality is principally degraded by light pollution – emissions from outdoor lights that cause direct glare and reduce the contrast of the night sky – but atmospheric clarity as plays a role.” Letter from Donna Owens, District Ranger, Powell Ranger District, Dixie National Forest, to Mary Ann Wright, Associate Director, Mining, Division of Oil, Gas, & Mining (May 9, 2008) [P-3].

Potential impact to the clarity of the night sky is more than speculation by the Petitioners. Supervisors of both the Dixie National Forest and Bryce Canyon National

Park raised concerns about the impact of the proposed Coal Hollow mine on the clarity of the night sky of the areas they manage. As indicated above, the District Ranger for Dixie National Forest wrote directly to the Division of Oil, Gas & Mining to raise these concerns. *See also*, Letter from Eddie Lopez, Supervisor of Bryce Canyon National Park (February 23, 2007) [P-4].² This letter was included in the record considered by the Division when evaluating the proposed Coal Hollow Mine application.

In addition, the President of Bryce Meadows Development Corporation wrote the Division of Oil, Gas and Mining opposing approval of the Coal Hollow Mine permit. Letter from Erich Bretthauer, President, Bryce Meadows Development Corporation to Department of Natural Resources (April 18, 2008) (pulled from Permit Record CD [D-1]: CO250025\2008\INCOMING\0015.pdf). The company is developing real estate five miles east of Bryce Canyon National Park. The letter states:

There are over 50 homes currently in the Subdivision. The homeowners desire the area in large part because of the unobstructed vistas. Visibility is very important to these homeowners. The proposed mining operation will produce particulates which are of an aerodynamic diameter that can be transported the short distance to the Subdivision and degrade visibility. The degradation of visibility would be detrimental to these homeowners and to values of vacant lots.

In fact, the Division itself in its Technical Analysis of the permit application acknowledged the need to address the clarity of the night sky. The Technical Analysis provides: “the Applicant has not discussed the effect on the night sky as seen from Bryce Canyon N.P. and the Dixie N.F. Therefore, this deficiency remains and must be addressed prior to receiving a recommendation for approval.” *See Final TA* at 83 [D-8].

The fact that the Bureau of Land Management is evaluating the quality of the

² While this letter was addressed to Keith Rigtrip at the BLM Kanab Field Office, it was submitted to the Division and considered as part of its permit record for the Coal Hollow Mine permit application. CO250025\2008\INCOMING\0001.pdf.

night sky in conjunction with the draft environmental impact statement for the federal coal lease that ACD is seeking does not excuse the Division from its legal obligation to address the issue before approving its permit. Petitioners' arguments do not rely on the National Environmental Policy Act ("NEPA"). The Division has an independent legal obligation – separate from NEPA – to ensure that any coal mine permit it approves includes a fugitive dust control plan that "effectively control[s] . . . air pollution attendant to erosion." UT ADC R645-301-244.100; UT ADC R645-301-423.200. One aspect of such air pollution is visibility impairment that can degrade the clarity of the night sky. *See* Informal Hearing Transcript (April 29, 2010), Testimony of Priscilla Burton at 115 ln 17-22:

17 MS. BUCCINO: So let me repeat that question,
18 which was: In your opinion, as a soil scientist, can
19 fugitive dust from the Coal Hollow Mine site affect
20 visibility outside of the immediate permit area?
21 MS. BURTON: Well, it could, and that's why
22 there's a dust control plan.

See also, Rule 30(b)(6) Deposition of Priscilla Burton (Feb. 22, 2010) at 82-83 (Q: In your professional opinion as an environmental scientist at the division, is there a connection, is there a relation that the fugitive dust has related to the clarity of the night skies? A. They both would affect the clarity of the night skies, fugitive dust and lighting.”)

II. The Division's Approval of the Coal Hollow Mine Violated the Applicable Cultural/Historic Resource Regulations.

The Division's regulations require each permit application to analyze potential adverse impacts from the proposed coal mining operations to “cultural and historic resources listed or eligible for listing in the National Register of Historic Places and

known archaeological sites within the permit and adjacent areas.” UT ADC R645-301-411.140. The permit application must “present evidence of clearances by the SHPO [State Historic Preservation Office].” UT ADC R645-301-411.142. The application must also include a plan that describes the measures to be used “to prevent adverse impacts” to “places listed on the National Register of Historic Places.” UT ADC R645-301-411.142. The regulations require the Division to make an explicit finding that it “has taken into account the effect of the proposed permitting action on properties listed on and eligible for listing on the National Register of Historic Places.” UT ADC R645-300-133.600. This finding must be supported by “information set forth in the application or from information otherwise available that is documented in the approval.” UT ADC R645-300-133.

Here, the Division has acknowledged that its cultural resource review at the time it approved the Coal Hollow Mine was incomplete. The Division had failed to evaluate the entire permit area. The evidence demonstrates that part of the permit area had been left out of the review. Moreover, the Division did not look beyond the permit area in making its determination of eligibility and effect. The adjacent area in this case includes the Panguitch National Historic District through which ACD proposed to haul all of the mine’s coal. The Board, however, need not resolve whether the Panguitch National Historic District is within the “adjacent area” associated with the Coal Hollow Mine for the Division failed to evaluate *any* adjacent area outside the permit area.

A. The Division’s Determination of Eligibility and Effect Failed to Cover the Entire Permit Area in Violation of UT ADC R645-301-411.140.

The Division has acknowledged that the cultural resource review completed prior to approval of the Coal Hollow Mine was incomplete. Letter to SHPO from Daron

Haddock (April 21, 2010) [D-21] (“a survey . . . of 440 acres of the Alton Amphitheater (that included 80 acres in the Coal Hollow mine permit area) had inadvertently not been submitted to the Division.”). The absence of a cultural resource inventory for part of the permit area rendered the permit application incomplete and the Division’s approval of it unlawful.

The Division’s findings supporting its permit approval and testimony at the April 29-30, 2010 hearing before the Board also establish that the Division had not received cultural resource inventories for part of the permit area. Jody Patterson, Principal Investigator with Montgomery Archeological Consultants (“MOAC”) testified that the company prepared three cultural resource inventories for ACD. Informal Hearing Transcript (April 30, 2010), Testimony of Jody Patterson at 366 ln 1-2; at 378 ln 22 to 383 ln 13. These inventories were dated March 10, 2006 [D-11], January 9, 2008 [D-17] and July 10, 2008 [D-19]. The Division’s Final Technical Analysis listing the documents it reviewed as part of its cultural resource review does not include *any* of these inventories. *Final TA* at 18 [D-8].³

Given the failure to include cultural inventories covering the entire permit area, Division staff admitted that the permit was incomplete when approved on October 19, 2009. Informal Hearing Transcript (April 30, 2010), Testimony of Daron Haddock, at 295 lns 3-6:

3 MS. BUCCINO: So the Division's determination of
4 eligibility and effect that was submitted to the SHPO on
5 November 2, 2007, was incomplete, then. Is that correct?

³ The sites identified in the first two of these inventories dated March 10, 2006 and January 9, 2008 were presumably included in the identification of sites in the Cultural Resource Management Plan dated May 23, 2008 [hereafter “CRMP”] [D-16]. The third inventory, however, was not included in the CRMP since it was completed after the CRMP submitted to the Division. Informal Hearing Transcript (April 30, 2010) at 375 ln 9-14.

6 MR. HADDOCK: I guess you could say it that way.

The only request that the Division made to the SHPO for concurrence on its determination of eligibility and effect was the one dated November 2, 2007. ***This request was made before two of the inventories that covered the permit area were completed.***

Testimony of Division staff confirms that a determination of eligibility and effect cannot be made until the cultural inventories are completed. *See* Informal Hearing Transcript (April 30, 2010) at 285 ln 17-24:

17 MS. BUCCINO: But do you agree that the
18 inventory is not the end of the cultural review process?

19 MR. HADDOCK: That is correct.

20 MS. BUCCINO: And once the inventory is done,
21 then the Division turns to making its determination of
22 eligibility and effect. Is that correct?

23 MR. HADDOCK: Well, once it's done and submitted
24 as part of their application, yes.

Here, the Division made its determination of eligibility and effect before two of the necessary inventories were completed. As a result, at least two adversely affected sites ***within the permit area*** (42Ka6093 and 42Ka6505) were left out of the Division's determination of eligibility and effect and left out of plans to mitigate adverse effects. Letter to SHPO from Daron Haddock (April 21, 2010) [D-21].

Even if the Division had reviewed the inventories, none of the three inventories includes information evaluating the effects of the proposed Coal Hollow Mine on the cultural and historic sites identified. The recommendations in all three inventories state that almost all of the sites will be avoided. *See* March 10, 2006 Inventory at 19 (of 15 eligible sites identified, two were flagged as being adversely affected – 42Ka2068 and 42Ka6108) [D-11]; January 9, 2008 Inventory at 45 (“It is recommended that all eligible sites be avoided.”) [D-17]; July 10, 2010 Inventory at 26 (“It is recommended that all

eligible sites be avoided.”) [D-19]. The inventories do not contain a discussion of the adverse effects and how to mitigate them.

B. The Division’s Determination of Eligibility and Effect Failed to Include Any Adjacent Area in Violation of UT ADC R645-301-411.140.

The Division failed to identify an adjacent area to evaluate for impacts on cultural and historic resources in addition to the permit area. The Division’s findings in the *Final TA* do not include any discussion of an adjacent area in the section addressing “Historic and Archeological Resource Information.” *Final TA* at 18-26 [D-8]. In contrast the section addressing hydrology does include a discussion of “adjacent area.” *See Final TA* at 47 (discussion of adjacent area for purposes of protecting alluvial valley floors). Division staff acknowledged that the permit application did not include a map indicating the boundaries of an adjacent area evaluated for purposes of the cultural and historic resource review. Informal Hearing Transcript (April 30, 2010), Testimony of Darron Haddock at 285 lns 2-3:

2 MR. HADDOCK: I don't believe there is a map
3 that delineates a specific boundary.

See also Informal Hearing Transcript, Statement by Board Member Jensen (April 30, 2010) at 298 ln 8-9: “MR. JENSEN: He just said there is no map showing the defined adjacent area.”

Moreover, the consultants who performed the archeological work for ACD have acknowledged that they did not look beyond the permit area in evaluating and addressing the adverse effects that the proposed Coal Hollow Mine would have on cultural and historic resources. *See* Rule 30(b)(6) Deposition of Alton Coal Development, Testimony of Jody Patterson (February 25, 2010) at 25 ln 21 to 26 ln 1:

Q: Did Montgomery Archeological Consultants make an evaluation of the effect of the Coal Hollow Mine as proposed in the permit application to the Division on any historic resources that are completely outside the permit area?

A: No.

None of the letters that the Division submitted to the SHPO prior to approving the Coal Hollow Mine permit made any mention of evaluation of an “adjacent area” in addition to the permit area. For example, the Division’s November 2, 2007 request to the SHPO for concurrence on the Eligibility and Effect Determination for the Coal Hollow Mine does not identify any adjacent area that was evaluated. [D-12] The letter identifies 15 sites. Fourteen of the sites were determined to be eligible for the National Register of Historic Places; seven of these eligible sites were determined to be adversely affected by the proposed mine. *Id.* Division staff have acknowledged that all fifteen sites are wholly or in part within the permit area. Informal Hearing Transcript, Testimony of Daron Haddock (April 30, 2010) at 289 lns 4-10:

4 So this is the letter from the Division to the
5 SHPO dated November 2, 2007.
6 And do you agree that the Division's request to
7 the State Historic Preservation office here was limited
8 to their fifteen sites listed on that letter; is that
9 correct?
10 MR. HADDOCK: That is correct.

The letter does not identify any sites located wholly outside the permit area. *See* D-11, Figure 1.

Recognizing its failure to address an adjacent area in its correspondence with the SHPO prior to permit approval on October 19, 2009, the Division sent SHPO a subsequent letter on March 30, 2010, specifically requesting concurrence that no adverse effects would occur in an adjacent area. Letter to Wilson Martin, State Historic

Preservation Officer, from Daron Haddock, Permit Supervisor (March 30, 2010) [P-5] at

2. The State Historic Preservation Office provided a response on April 26, 2010, but did not provide any concurrence related to an adjacent area. Letter to Daron Haddock,

Permit Supervisor, from Lori Hunsaker, Deputy State Historic Preservation Officer (April

26, 2010) [D-22]. *See also*, Informal Hearing Transcript (April 30, 2010), Testimony of

Daron Haddock, at 299 ln 22 to 300 ln 9:

22 MS. BUCCINO: Yes. So in the last paragraph on
23 page 2, you specifically ask that the SHPO concur, and I
24 quote, "With the Division's determination that the
25 identification of the fifteen sites and the mitigation on
0300

1 the eight sites includes the necessary determination and
2 mitigation for the mine project, including effects on the
3 adjacent lands." Is that correct?

4 MR. HADDOCK: Yes.

5 MS. BUCCINO: And now if we could just look at
6 the April 26, 2010, answer from the SHPO, which was
7 marked as D-22. So there's no reference in this letter
8 from the SHPO to the adjacent area. Is that correct?

9 MR. HADDOCK: I don't see any reference.

Testimony by Division staff at the April 29-30, 2010 hearing calls into question the validity of the SHPO's concurrence regardless of the content of the request. Permit Supervisor Daron Haddock stated that the request and concurrence received was based on a version of the permit that was denied. Informal Hearing Transcript (April 30, 2010), Testimony of Daron Haddock at 290 lns 3-7:

3 I should point out that this letter was sent out in
4 November of 2007. This was actually done on -- the
5 original application that was later denied, and the
6 actual application that was determined administratively
7 complete, wasn't submitted until after this date.

Nothing in the record indicates that a subsequent concurrence was requested or given.

In sum, nothing in the permit record indicates the geographic area that the Division evaluated as the “adjacent area” in addition to the permit area when reviewing the proposed Coal Hollow Mine’s impacts on cultural and historic resources. Moreover, nothing in the permit record indicates that the SHPO provided any concurrence related to an adjacent area outside the permit area. Given the Division’s obligations under its own regulations to document its findings and “clearances by the SHPO,” the absence of the identification of an adjacent area evaluated renders the Division’s approval of the Coal Hollow Mine permit application unlawfully incomplete.

C. The Division’s Determination of Eligibility and Effect Failed to Include the Panguitch National Historic District in Violation of UT ADC R645-301-411.140 and Utah Code § 9-8-404.

Even if the Board determines that the Division did identify and evaluate an adjacent area in making its determination of eligibility and effect, the Division failed to meet its cultural/ historic review obligations by failing to include the Panguitch National Historic District in that area. “Adjacent area” includes an area “outside the permit area” that “reasonably could be expected to be adversely impacted by proposed coal mining and reclamation operations.” UT-ADC R645-100-200. “Reasonably foreseeable transportation routes” appropriately fall within the adjacent area to be analyzed for impacts of the proposed mine on cultural and historic resources. Without question, the hundreds coal truck trips through the Panguitch National Historic District each day that would be directly traceable to and would be generated solely by the Coal Hollow Mine operations “reasonably could be expected to” adversely impact the town.

1. Excluding the Panguitch National Historic District from the Adjacent Area Defeats the Purpose and Intent of Utah Code § 9-8-404 and the National Historic Preservation Act.

The Division must interpret the term “adjacent area” in a way that is consistent with both federal and state law. Utah statutes impose an explicit legal obligation on all state agencies including the Division here to “take into account the effect . . . on any historic property” *before* “expending any state funds or approving any undertaking.” Utah Code § 9-8-404(1)(a). “Effect” is not limited to direct effects, but includes indirect effects such as transportation. Memorandum from Matthew Seddon, Deputy Staff Historic Preservation Officer and Lori Hunsaker, Public Lands Policy Coordination Office to Joe Helfich, UDOGM, Comments on Alton Coal Cultural Resource Management Plan (CRMP) and Data Recovery Plan (07-1471) (May 6, 2008) [hereafter “*SHPO Memo*”] at 1 [P-9]. The language in the Utah Code to “take into account the effect” of a state undertaking is the same as the language applicable to federal agencies under the National Historic Preservation Act “to take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register.” 16 U.S.C. § 470f. Federal regulations include “indirect” effects within the meaning of “effect.” 36 C.F.R. § 800.16(d).

Division staff have acknowledged the similarity between state and federal requirements for the protection of cultural and historic resources. *See* Informal Transcript (April 29, 2010), Testimony of Daron Haddock at 183 ln 2-16:

- 2 MR. ALDER: All right. Do you know the
- 3 difference between the cultural resource requirements for
- 4 cultural resource clearance under the federal process?
- 5 Are you familiar with the federal process?
- 6 MR. HADDOCK: Yes, there is -- I believe it's
- 7 referred to as 36 CFR 800 section, in Section 106, where
- 8 the federal requirements for protection of cultural
- 9 resources are discussed.
- 10 MR. ALDER: And how do those requirements
- 11 compare to the requirements under Section 9-8-404?

12 MR. HADDOCK: They are very similar. The main
13 difference is that the federal requirements deal with
14 federal lands and expenditures of federal funds, whereas
15 the state requires -- the 404 requirements have to do
16 with the expenditure of state funds.

Given the similarity between the federal and state requirements, it was arbitrary and capricious for the Division to exclude the Coal Hollow Mine's impacts of hauling coal through the Panguitch National Historic District from its cultural/ historic resource review.

When evaluating oil and gas leases, federal courts have concluded that "effects" reach beyond the permit area and can include impacts related to transportation over routes extending significant distances from the site of extraction. *Wilson v. Block*, 708 F.2d 735, 754 (D.C. Cir. 1983) (upholding area of potential effect determination that included a project's access road). The analysis required under the NHPA is not limited to the lease parcel boundaries, but must include access roads. *Colo. River Indian Tribes v. Marsh*, 605 F. Supp. 1425, 1437 (C.D. Cal 1985) (rejecting use of a project's "permit area" as the "area of potential effect" for Section 106 consultation). Given the similarity of the obligation under Utah Code § 9-8-404(1)(a) and the language in NHPA, the Division should have included reasonably foreseeable transportation routes from the Coal Hollow mine in the required cultural/ historic resource review as federal courts have included access roads in the cultural/ historic review required for oil and gas lease parcels.

The Division must also interpret the term "adjacent area" in a way that is consistent with the NHPA because the Division operates under a grant of authority from the Office of Surface Mining Reclamation and Enforcement ("OSM"). OSM is

responsible for implementing the Surface Mining Control and Reclamation Act (“SMCRA”). 30 U.S.C. §1201 *et seq.* Even where OSM delegates primary authority for the regulation of coal mining to a state as it has done in Utah, the state program must be consistent with federal laws like SMCRA and the NHPA. *Indiana Coal Council, Inc. v. Lujan*, 774 F. Supp. 1385, 1403 (D.D.C. 1991). *See also*, 16 U.S.C. § 470w(7) (defining “undertaking” as any “project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including- . . . (D) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency”).

2. The Uncontested Fact that the Highways that ACD Will Use to Transport Coal are Not “Surface Coal Mining Operations” that the Division May Regulate Does Not Excuse the Division’s Failure to Address the Directly Traceable Impacts on the Panguitch National Historic District of Hauling Coal from the Coal Hollow Mine.

Contrary to ACD’s previous arguments (ACD SJ Motion at 13-14), the public road exclusion discussed in *Harman Mining Corp. v. Office of Surface Mining Reclamation & Enforcement*, 659 F.Supp. 806, 812 (W.D. Va. 1987) is completely irrelevant to the issue that Petitioners raise concerning failure to consider the effect of the Coal Hollow Mine on Panguitch. *Harman* concerns whether public roads used for hauling coal fall within the regulatory definition of “affected area” and thus require those who use them to obtain a SMCRA permit to do so. Here, Petitioners do not argue that Highway 89 is part of the “affected area” of ACD’s mine or that ACD is required to include Highway 89 within the “permit area” of the Coal Hollow Mine.

Instead, Petitioners argue that Highway 89 and the Panguitch National Historic District through which it runs lie within the larger “adjacent area” that by definition is

entirely outside the “permit area” of ACD’s mine. This is so because Highway 89 and Panguitch are quite plainly an area of land that “reasonably could be expected to be adversely impacted by proposed coal mining and reclamation operations.” UT-ADC R645-100-200.

ACD has identified travel through the Panguitch National Historic District by truck as the “reasonably foreseeable transportation route” for the coal produced from the Coal Hollow Mine. CRMP at 3 [D-16] (“The reasonably foreseeable transportation route (Figure 3) extends west from Alton on CR-10/Cistern Road, north along US-89 through the NRHP Historic District in Panguitch to SR-20”); *see also* CRMP, Figure 3, at 5 [D-16]. *See also*, Informal Hearing Transcript (April 29, 2010), Testimony of Dana Dean at 57 lns 14-17:

14 MS. BUCCINO: Is it your understanding that that
15 coal produced from the Coal Hollow Mine would leave the
16 mine by trucks and travel on Highway 89?
17 MS. DEAN: Yes, that's my understanding.

The Coal Hollow Mine was approved to produce 2 million tons of coal a year and operate six days a week. Informal Hearing Transcript (April 29, 2010), Testimony of Dana Dean at 25 lns 12-14:

12 MS. DEAN: Yes. This will be a truck-and-shovel
13 operation. They plan to mine six days a week, 24 hours a
14 day. And they plan to mine 2 million tons per year.

Numerous citizens submitted comments to the Division concerned about the impacts of the truck traffic from the mine through the Panguitch National Historic District. *See, e.g.*, Email from Donna Owens to Daron Haddock (May 22, 2008) [P-11] (pulled from Permit Record CD [D-1]: CO250025\2008\INCOMING\0096.pdf):

I own a historic pioneer home built in 1897 in Panguitch. . . . My home is

located one block from Highway 89 where a coal truck is projected to travel through the Historic District every 4 minutes every day, all day. How can this level of traffic, vibration, and noise be consistent with preserving the historic values associated with a National designation?

Another resident and shop owner in Panguitch wrote to the Division:

My husband and I reside in Panguitch and also own a retail store on Main Street. . . . If the proposed route is used to haul coal from Alton to Cedar city (down Center street, turning on to Main Street), we will have coal trucks every 4.8 minutes barreling through town. What will happen to our Historic District (that we fought so hard for and recently received this designation)? What damage will those additional trucks have on our red brick buildings? How will motels survive with the noise those coal trucks will produce, not to mentioned the fumes and coal dust?

Email from Becky Yard to Daron Haddock (May 13, 2008) [P-12] (pulled from Permit Record CD [D-1]: CO250025\2008\INCOMING\0047.pdf). On June 20, 2008, thirty-seven residents and business owners from the Panguitch/ Hatch area submitted a petition to the Utah Division of Oil, Gas and Mining requesting further studies on the impacts of the mine on adjacent areas including the Panguitch National Historic District. Bobbi Bryant et al. re. Alton Coal Development (June 20, 2008) (pulled from Permit Record CD [D-1]: CO250025\2008\INCOMING\0124.pdf).

Given that the Coal Hollow Mine would be the sole source of coal trucks running through the Panguitch National Historic District, the Division's regulations demand the inclusion of the Panguitch National Historic District in the adjacent area analyzed for impacts on cultural and historic resources under the Division's regulations. Such interpretation of the meaning of "adjacent area" as defined in UT-ADC R645-100-200 is reinforced by the separate requirement in the Division's regulations prohibiting adverse effects on "any place in the National Register of Historic Places" unless the State Historic Preservation Office has concurred in the decision. UT ADC R645-103-200.236. The law

plainly forbids the issuance of a permit for the Coal Hollow Mine absent consideration of whether such adverse effects will occur, followed by an appropriate written decision of the Division and SHPO jointly to approve the issuance of a mining permit despite the adverse effects. *Id.*; *see also* 30 U.S.C. § 1272(e)(3); 30 C.F.R. § 761.11(c). The definition of “adjacent area” must be interpreted in a way that is consistent with the other portions of the Division’s regulations.

3. The Division Failed to Obtain the SHPO’s Concurrence in Any Determination to Exclude the Panguitch National Historic District from the Analysis of the Coal Hollow Mine’s Impacts on Cultural and Historic Resources.

As explained above, both federal and state law required the Division to obtain the SHPO’s concurrence in its determination regarding the Panguitch National Historic District. 30 U.S.C. § 1272(e)(3); 30 C.F.R. § 761.11(c); R645-103-200.236. *See also* UT ADC R645-301-411.142 (requirement to “present evidence of clearances by the SHPO”). The Division did not request or obtain the SHPO’s concurrence to issue the ACD permit despite the adverse effect that coal truck traffic will certainly have on the town. In fact, evidence in the permit record demonstrates that the SHPO believed that the impacts of the mine on the Panguitch National Historic District needed to be addressed *before* the Division approved the Coal Hollow mine permit. The Division cannot approve a permit application “unless the application affirmatively demonstrates and the Division finds, in writing . . . [that] the application is complete and accurate.” UT ADC R645-300-133. The Coal Hollow Mine application was incomplete without the SHPO’s concurrence to exclude the Panguitch National Historic District from the cultural/historic resource review.

Communication from the State Historic Preservation Office to the Division

demonstrates the SHPO's intent that the mine's impacts on the Panguitch National Historic District would be addressed. In a May 5, 2008 email to Joe Helfrich, the Division staff member who served as the point person for the cultural/ historic resource review, Matthew Seddon, the Deputy State Historic Preservation Officer, writes: "I've brought our buildings specialists, primarily Chris Hansen, in the loop. He can help you with analysis of effects to Panguitch." [P-10]. At the April 29-30, 2010 hearing before the Board, Division staffer Joe Helfrich confirmed in testimony that he understood that the SHPO was working *with the Division* to ensure that the impacts on Panguitch were addressed:

- 4 MS. BUCCINO: Okay. And so is it correct, then,
- 5 you agree that the SHPO, as evidenced in this email, was
- 6 working with the Division to ensure that the impacts of
- 7 the proposed Coal Hollow Mine on buildings in Panguitch
- 8 were addressed and analyzed?
- 9 MR. HELFRICH: Yes.

Informal Hearing Transcript (April 30, 2010), Testimony of Joe Helfrich, at 337 Ins 4-9.

On May 6, 2008, Mr. Seddon sent a memorandum to Joe Helfrich, UDOGM, stating:

We recommend that prior to submitting the plan as part of a consultation package under Utah Code 9-8-404 that UDOGM *ensure* that the following changes are made:

...

Effected (sic) Environment – Pages 1 on – As long as we are commenting on more substantial matters, we note that the correct term is "Affected Environment." This section needs to include the entire project area, including potential transportation routes, with maps, rather than focusing solely on the archaeology. . . . Other cultural resources such as the National Register of Historic Places Historic District in Panguitch should be mentioned in Table 2.

SHPO Memo at 1 (emphasis in original) [P-9]. As indicated in this SHPO memo to the

Division, the State Historic Preservation Office viewed analysis of the mine's impacts on the Panguitch National Historic District as a component of the Division's duties under Utah Code § 9-8-404.

The permit record as submitted by the Division [D-1] lacks any evidence that the Division requested that the SHPO concur in a determination to exclude the Panguitch National Historic District from its cultural and historic resource review. In testimony at the April 29-30, 2010 hearing before the Board, Permit Supervisor Daron Haddock confirmed that the Division never asked the SHPO to concur in its determination to exclude Panguitch:

24 MS. BUCCINO: Thank you. And we've looked at
25 the text of those two letters. The Division never
0312
1 explicitly sought the SHPO's concurrence on its
2 determination to exclude the Panguitch National Historic
3 District. Is that correct? There's no reference in
4 either of those two letters to Panguitch National
5 Historic District. Is that correct?
6 MR. HADDOCK: That is correct.

Informal Hearing Transcript (April 30, 2010), Testimony of Daron Haddock at 311 ln 24 to 312 ln 6.

Even when asked after the permit had been approved to endorse the Division's approach that excluded analysis of Panguitch, the SHPO refused to do so. Letter to Daron Haddock, Permit Supervisor, from Lori Hunsaker, Deputy State Historic Preservation Officer (April 26, 2010) [D-22]. The SHPO's concurrence was limited to the 15 original sites identified in the November 2, 2007, request for concurrence plus the two additional sites identified in March 2010. All seventeen sites were located at least in part within the permit area.

The Division acknowledges that it did not analyze any means to mitigate the impacts of the proposed Coal Hollow Mine on the Panguitch National Historic District. Informal Hearing Transcript (April 29, 2010), Testimony of Daron Haddock, at 207 lns 10-21 (comments related to truck traffic through Panguitch were forwarded to the Department of Transportation). Without having conducted such analysis related to the Panguitch National Historic District, the Division could not have taken the step required by R645-103-200.236 to consult with the SHPO regarding whether it was appropriate to proceed with the mine despite adverse effects that may occur on the historic district.

CONCLUSION

For the reasons stated herein, Petitioners request that the Board find the Division's approval of the Coal Hollow Mine permit application unlawful and remand it to the Division for further consideration. The Board should complete its review of the hydrology and geology issues prior to remand.

Dated: May 12, 2010

Respectfully submitted,

By: /s/ Sharon Buccino

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of May, 2010, I served a true and correct copy of **PETITIONERS' POST-HEARING BRIEF ADDRESSING AIR QUALITY AND CULTURAL/ HISTORIC ISSUES** to each of the persons listed below via e-mail transmission.

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